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No. 88-1697

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

HAJOCA CORPORATION,
Petitioner,

v.

WARREN G. HEROLD,
Respondent.

REPLY BRIEF FOR PETITIONER

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

Respondent, Warren G. Herold ("Herold"), asks the Court to believe that Petitioner, Hajoca Corporation ("Hajoca"), is not asking the Court to review a "fundamental issue of Federal employment discrimination law' " but to review "this ordinary evidentiary dispute." (R.Br. 7). Herold's *a posteriori* argument that because the jury found in favor of Herold there must have been evidence "to support a determination that Herold was the victim of intentional age discrimination" (*Id.*) is an obvious attempt to convert an error of law ripe for determination by the Court into a factual dispute not normally the subject of the Court's beleaguered docket. Hajoca submits that the issue it presents to the Court is not whether "the jury should have reached a different result," (R.Br. 13) but whether the jury should have been permitted to consider the evidence at all. Hajoca

does not ask the Court to weigh the evidence submitted at trial but to determine whether there is any evidence which links Hajoca's reasons for Herold's termination with age discrimination. In other words, Hajoca asks the Court to correct the confused and mistaken understanding of "pretext" as espoused by the court below in order to clarify the meaning of "pretext for discrimination," proof of which must be presented before a court can permit an age discrimination claim to go to a jury under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

The court below found that the evidence at trial "presented two versions of what happened and resolution of the case depended on which witnesses were credible." (Pet. at A-7-8). The court below concluded that "the jury could properly have found that Hajoca's proffered reasons for dismissing Herold were mere pretexts and that it was more likely that age was the real reason for his firing." (Pet. at A-7). Herold also places great emphasis on the purported credibility issues when he argues "[t]he only issue presented for review by this Court depends on no more than an assessment of which witnesses should have been believed." (R.Br. at 13). Both Herold and the court below misapprehend the teaching of *Burdine*.

As previously stated by this Court, after a *prima facie* case is established, and after the employer articulates nondiscriminatory reasons for the employment decision, the plaintiff retains the burden of proving "that the proffered reason was not the true reason for the employment decision." *Burdine*, 450 U.S. at 256. In other words, the plaintiff must prove the reasons were not the "true reasons, but were a pretext for discrimination." Id. at 253 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973)).

Herold and the court below confuse "credibility" with *Burdine's* "unworthy of credence" language. *Burdine's* "unworthy of credence" standard is another way of stating the fundamental causation requirement in all employment discrimination cases. Unless an employer's action is caused by a statutorily prohibited motivation, the reasons for the action are not subject to jury scrutiny because no prohibited action has occurred. The court below does not require proof of causation but merely subjective disagreement with an objectively truthful explanation for a business decision.

Merely offering evidence which disagrees with some of an employer's reasons for its decision does not prove, as required by *Burdine*, that those reasons were not the true reasons for the decision, and most certainly does not prove that those reasons were a cover-up for discrimination.[1] If the reasoning of the court below is allowed to stand, any employee who disagrees with his employer's reasons for discharge can have his fate decided by a jury under the guise of a credibility determination without one shred of evidence that either the employer did not believe those reasons, or that the reasons were a cover-up for discrimination.

Hajoca readily admits that this case, as Herold claims, is distinguishable from *Brieck v. Harbison-Walker Refractories*, No. 86-3068 (3d Cir. June 19, 1987), *cert. granted*, 108 S.Ct. 1218 (1988), *cert. withdrawn*, 57 U.S.L.W. 4063 (December 12, 1988); however, this case is distinguishable for reasons not cited by Herold. In *Brieck*, the denial of summary judgment by the Third Circuit Court of Appeals was challenged on the grounds stated in Herold's brief at page 11, n.4.

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1. The evidence offered by Herold on the issue of pretext clearly is not the type of evidence recognized by the Court in *McDonnell Douglas* and *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983) as relevant evidence of pretext for discrimination. *See* Pet. at 9-10.

However, subsequent proceedings before the Court revealed that the dispute centered on the weight to be given evidence on a summary judgment motion, not whether, as in this case, a jury should be permitted to consider an employer's business judgment without any direct or indirect evidence that the judgment was motivated by an intent to discriminate.[2] This case poses the precise question considered important by the Court in *Brieck*.

Finally, Herold's claim that Hajoca misstates the opinion of the court below is unsupported by any reference to the record. In fact, the court below cavalierly distinguished this case from *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230 (4th Cir.1982), a decision which Herold quotes, on the grounds that Herold, unlike the plaintiff in *Lovelace*, "presented evidence directly challenging all of the reasons offered by Hajoca." (Pet. at A-8). Had the court below properly followed the *Lovelace* decision, the court below would have granted judgment in favor of Hajoca.

The issue of causation in employment discrimination cases has been addressed innumerable times by the circuit courts of appeal. The principles of *McDonnell Douglas* and *Burdine* appear straightforward, yet, as Hajoca's Petition shows, have been applied in starkly contrasting ways. *See Price Waterhouse v. Hopkins*, 57 U.S.L.W. 4469 (U.S. May 1, 1989) (Kennedy, J. dissenting, "Lower courts long have had difficulty applying *McDonnell Douglas* and *Burdine*." 57 U.S.L.W. at 4486). That the court below incorrectly applied these principles is clear. That a conflict among the circuit

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2. Of course, the question posed to the Court in this case involves consideration of the evidence presented in the Court below. To that extent, the question is fact-bound. However, the principle of law involved is fundamental — can a jury in an employment discrimination case consider an employer's business judgment without any evidence that the judgment was motivated by discriminatory animus?

courts exists is also clear. For these reasons, a writ of certiorari should issue.

Respectfully submitted,

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